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In The

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE LEAGUE TO SAVE LAKE TAHOE IN SUPPORT OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

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INTEREST OF AMICUS CURIAE

The League to Save Lake Tahoe (the "League") is a nonprofit membership organization dedicated to preserving the environmental balance, scenic beauty, and recreational opportunities of the Lake Tahoe Basin--"an area of unique and unsurpassed beauty situated high in the Sierras along the California-Nevada border." People ex rel. Younger v. County of El Dorado, 487 P.2d 1193, 1194 (Cal. 1971). Formed in 1957 in response to the environmental degradation occurring in the Tahoe Basin, the League comprises a cross section of the Lake Tahoe community: property owners, businesses, environmentalists, and local residents.

The League has long advocated a comprehensive approach to protecting the sensitive resources of the Lake Tahoe Basin. In 1984, the League, along with the State of California, challenged the adoption by the Tahoe Regional Planning Agency ("TRPA") of a new regional plan, on the grounds that the plan failed to achieve the environmental goals of the Congressionally-approved Tahoe Regional Planning Compact ("1980 Compact"). California v. Tahoe Regional Planning Agency; League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 766 F.2d 1308 (9th Cir. 1985) [hereinafter California v. TRPA]. Finding that the regional plan did not meet the requirements of the 1980 Compact, the district court issued a preliminary injunction barring the approval (with certain narrow exceptions) of any development in the Tahoe Basin until TRPA developed a regional plan that would protect the ecology of the Lake. The ninth circuit upheld the district court's ruling and its issuance of a preliminary injunction. Id.

Following issuance of the preliminary injunction, TRPA initiated a broad-based consensus process to develop a regional plan that would comply with the requirements of the 1980 Compact. This process, in which the League was an active participant along with other parties representing the broad range of interests affected by land use decisions in the Lake Tahoe Basin, resulted in TRPA's adoption of the 1987 regional plan. Although the League was concerned that aspects of the 1987

regional plan, such as the transfer of development rights (or "TDR") program at issue here, would increase the overall level of development in the Basin, the League accepted the plan as a compromise that would help to assure necessary environmental protections.

Believing that TRPA has been too willing to permit development at the expense of the environment, the League has often found itself on the opposite side of TRPA during the many battles to protect the Lake Tahoe environment. In addition to its suit over the 1984 regional plan, the League has sued TRPA over the agency's failure to ensure that transportation funds are spent on public transportation, League to Save Lake Tahoe v. Tahoe Regional Planning Agency, No. SLT 10055 (Super. Ct. filed 1990), and more recently, over the approval of the Douglas County Community Plan, League to Save Lake Tahoe v. Tahoe Regional Planning Agency, No. CV S 940069 EJG/JFM (E.D. Cal. filed 1994). These actions were successfully resolved and resulted in improvements in TRPA's regulatory programs.

Over time and with considerable effort from all sides, the conflicts that shaped land use regulatory programs in the Basin have given way to a more consensus-based approach to resolving environmental disputes. The League has been at the forefront of these more cooperative efforts. For example, the League has participated in long-term negotiations over the planned redevelopment of South Lake Tahoe, and is involved (along with business and casino interests) in the Tahoe Transportation Coalition which seeks to improve transportation to and within the Basin. The League is also an active participant in ongoing discussions of the Forest Health Consensus Group, a coalition of governments, private landowners, and other interested parties seeking to develop a management plan for forest lands in the Basin.

The 1987 TRPA regional plan, the product of a lengthy consensus process, represents in the League's view not perfection but an acceptable balance between safeguarding individual property rights and protecting environmental resources. Petitioner's suit threatens this balance.

Written consent to file this brief has been granted by counsel for both respondent and petitioner, and has been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

Because of its spectacular natural beauty, Lake Tahoe, located just a few hours from several major metropolitan areas, has experienced tremendous growth since 1950 and has become the anchor of a regional economy dependent on water recreation, skiing, entertainment, and second homes. People ex rel. Younger, 487 P.2d at 1195 n.3. Development in the Basin, which has been spurred by the quality of the lake environment, is also the primary threat to the attribute that makes Lake Tahoe unique: the quality and clarity of the Lake's water. Described by Mark Twain as "a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea . . . [and] the fairest picture the whole earth affords," id. at 1194 (citing 1 Roughing It (Harper & Row) chapter 22, page 15), Lake Tahoe is one of the clearest lakes in the world. People ex rel. Younger, 487 P.2d at 1195 n.5 (citing S.Rep. 91-510, 91st Cong., 1st Sess. (1969)). Sedimentation, erosion, and increased nutrient levels in the Lake, all caused by development in the Basin, however, have diminished the clarity and quality of the Lake's water. Thirty years of water quality monitoring reveals that the famous clarity of Lake Tahoe is rapidly declining. Charles R. Goldman, et al., Decadal, Interannual, and Seasonal Variability in Enrichment Bioassays at Lake Tahoe, California-Nevada, USA, 50 Canadian J. of Fisheries and Aquatic Sci. 1489, 1489 (1993) [hereinafter Goldman].

In 1987, following years of planning, debate, litigation and finally consensus, TRPA enacted a regional plan designed to mitigate the impacts of development, manage the rate and location of future development, improve water quality in the Lake, and protect the interests of property owners consistent with

these environmental goals.[1] TRPA's 1987 regional plan regulates development throughout the Basin and prohibits development on environmentally sensitive lands, including stream environment zones such as the area where petitioner's lot is located. TRPA also adopted a transfer of development rights program which allows property owners to use and receive value for their property by transferring development from environmentally sensitive property to lands more suitable for development.

The 1987 regional plan, which builds on earlier efforts to protect the Basin, is the subject of petitioner's takings challenge. The issue presented for review is whether petitioner was required to participate in the TRPA transfer of development rights program before she could demonstrate that her takings claim is ripe for judicial review. Both courts below held petitioner's takings claim not ripe. This holding is correct, as petitioner has not made a single application to transfer her development rights, and therefore has not received a final determination regarding the use to which her property rights may be put under TRPA's regulatory program.

In an attempt to circumvent the ruling of the Ninth Circuit, petitioner argues that the TDR program does not provide her with "use" of her property, and therefore the ripeness doctrine does not apply. Petitioner's Brief on the Merits at 12-14, 23 [hereinafter Petitioner's Brief]. Petitioner further claims that any application for approval under the TDR program would be futile because the program is nothing more than a "ruse" to circumvent this court's ruling in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Petitioner's Brief, supra, at 23.

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[1] The 1987 regional plan consists of two documents: Tahoe Regional Planning Agency, Regional Plan for the Lake Tahoe Basin, Goals and Policies (adopted Sept. 17, 1986) [hereinafter Goals and Policies]; and Tahoe Regional Planning Agency, Regional Plan for the Lake Tahoe Basin, Code of Ordinance and Rules of Procedure (adopted May 27, 1987) [hereinafter Code of Ordinances].

To the extent the Court entertains petitioner's challenge to the merits of TDR programs, such challenge must fail. As this brief will explain, TRPA's program for transferring development rights between properties located in the Tahoe Basin is part of a carefully constructed regulatory program designed to reduce the documented adverse impacts of development on the water quality of Lake Tahoe, while ensuring significant economic benefits to all property owners in the region (including petitioner). In preventing development on petitioner's property, TRPA has not prohibited all use of her property nor has it deprived petitioner of all economic value in her property. Indeed, the record below is replete with evidence that petitioner's property retains significant economic value. The program as a whole achieves a reciprocity of advantage to all concerned, and, as such, falls comfortably within the limits of constitutionally permissible land use regulation.

ARGUMENT

I. THE TRPA PROGRAM REPRESENTS A VALID EXERCISE OF THE GOVERNMENT'S POWER TO REGULATE LAND USE TO PROTECT UNIQUE AND SENSITIVE NATURAL RESOURCES.

The TRPA program protects important government interests, ensures that petitioner's property has substantial value, and provides an effective means for petitioner to realize her reasonable investment backed expectations. Therefore, under established Supreme Court precedent, TRPA's program does not constitute a taking.

A. The Lucas "Total Taking" Analysis is Inapplicable Here.

The briefs of petitioner and amici in support of petitioner start from a faulty premise: they posit that the TRPA program is invalid under Lucas because it prohibits development of a single family home on petitioner's property. According to petitioner, the TDR program is merely a ploy to avoid this Court's holding

in Lucas.[2] This is incorrect: in fact Lucas is inapplicable here because TRPA's program neither deprives petitioner of all reasonable uses of her property, nor renders her property valueless.

Petitioner's reliance on the categorical takings analysis of Lucas is based on an overly narrow view of property rights that inappropriately equates the right to "develop" property with the right to "use" property. This Court has always viewed property as a "bundle of rights," which includes among other things, the right to exclude, the right to develop, and the right to sell. Id. at 1027. All of these rights represent "uses" of property; for example, the "right to exclude" has been described by this Court as a "private use" of property. Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987). TDRs also have been described by this Court as a use of property. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978) (the "ability to use [pre-existing] air rights" through a TDR program constitutes a potentially viable use of property.)

The relevant issue for a takings analysis is whether, under the challenged regulation, the property owner's rights may be put to an economically viable use. See, e.g., Lucas, 505 U.S. at 1017 ("[F]or what is the land but the profits thereof?") (citations omitted) and at 1026 (treating the South Carolina coastal law as "a regulation that wholly eliminated the value of the claimant's land."); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) ("What makes the right to mine coal valuable is that it can be exercised with profit.") Often value is associated with the right to develop; however, land that cannot be developed can have significant value for such rights as investment, timber harvesting, farming, or mineral extraction.

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[2] The TDR program was implemented in 1987--well before the Lucas decision was issued. As a simple factual matter, therefore, the program cannot be characterized as an attempt to circumvent this Court's ruling in Lucas.

In the present case, the TRPA program confers on petitioner certain entitlements and rights to use her property in various ways that would not be possible absent the program. Petitioner's ability to transfer specified entitlements represents the development potential of her property under the TRPA program. Petitioner has or can obtain and can transfer three separate development rights: an "allocation" to build a residential unit; up to four residential development rights (which can include three bonus units because her property is located in a stream environment zone); and land coverage rights. Although her use of these rights may be conditioned (they must be transferred to another property); it has not been eliminated. Furthermore, petitioner's rights carry substantial value. See infra Section I.D. Because petitioner possesses property rights with considerable value, this case does not present a categorical taking under Lucas.

B. After Lucas, A Takings Claim Must Still Consider The Balance Between the Governmental Interest At Stake and the Impact of the Land Use Regulatory Program on the Property Owner.

Petitioner fails to read Lucas in the context of the Supreme Court precedent that predates it. Lucas did not abrogate this Court's historic balancing approach to takings analysis. From Pennsylvania Coal through Lucas, this Court has consistently recognized the necessity of land use regulation to protect a broad range of public interests. Thus, this Court has upheld land use regulations that: order the destruction of diseased cedar trees to prevent infection of nearby orchards, Miller v. Schoene, 276 U.S. 272 (1928); prevent operation of a quarry in a residential area, Goldblatt v. Hempstead, 369 U.S. 590 (1962); preserve historic structures, Penn Central, 438 U.S. 104; protect open space, Agins v. City of Tiburon, 447 U.S. 255 (1980); and regulate coal mining to protect neighboring properties, Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987); see also Hadacheck v. Sebastian, 239 U.S. 394 (1915) (barring operation of a brick mill in a residential area).

These decisions all reflect the principle set forth in Penn Central, that when "deciding whether a particular governmental action has effected a taking, this Court focuses [ ] both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ." 438 U.S. at 130-31; see also Keystone Bituminous, 480 U.S. at 490 (reaffirming "the important role that the nature of the state action plays in our takings analysis" and citing Goldblatt, 369 U.S. at 594 and Consolidated Rock Products Co. v. Los Angeles, 370 P.2d 342, appeal dismissed, 371 U.S. 36 (1962)). Petitioner, however, would do away with any inquiry into the nature of the regulatory program at issue whenever a regulation prohibits physical development of property. Lucas does not support such a position.

In Lucas, this Court determined that government may prohibit all use of property and render the property valueless, without effecting a taking, where such restriction inheres in the "law of property and nuisance." 505 U.S. at 1029. Thus, the balancing test of Penn Central, which evaluates the nature of the public interest at stake and the extent to which the proposed regulation interferes with the property owner's interest in its property, remains critical to the takings analysis. See id. at 1029-31. In Lucas, this Court struck this balance such that regulations rendering property valueless must be based on the background principles of nuisance law. Land use restrictions such as those at issue here that do not result in a "total taking," Lucas, 505 U.S. at 1030, of the value of property must be balanced against the governmental interests that prompted the regulatory scheme. These restrictions do not, however, need to satisfy the strict requirements of the nuisance doctrine.

Indeed, even as to regulations that render property "valueless," members of this Court have criticized the majority's opinion in Lucas as inappropriately limiting the government's regulatory authority: "The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." Lucas, 505 U.S. at 1035 (J., Kennedy concurring). As recognized by Justice Kennedy, the validity of land use regulations must be guided by the reasonable

expectations of the property owner balanced against the need to enact "new regulatory initiatives in response to changing conditions . . . ." Id. Where, as here, the government is faced with "such unique concerns for a fragile land system the State can go further in regulating its development and use than the common law of nuisance might otherwise permit." Id.[3]

Justice Kennedy's concurring opinion in Lucas follows a line of Supreme Court precedent recognizing the need for and constitutionality of strong land use regulations to protect important public interests. The government's authority to regulate land use has never been limited to the ability to abate nuisances. See, e.g., Keystone Bituminous, 480 U.S. at 492 ("[T]he public interest in preventing activities similar to public nuisance is a substantial one, which in many instances has not required compensation.") (emphasis added). Therefore, when addressing a claim for compensation stemming from the destruction of cedar trees in Miller v. Schoene, 276 U.S. 272, this Court found it need not "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." Id. at 280; see also Goldblatt, 396 U.S. at 593 ("Nor is it of controlling significance that the 'use' prohibited here . . . is arguably not a common-law nuisance.") (Citations omitted).

The fragile natural resources at Lake Tahoe and the well-documented threats to these resources posed by development in the Tahoe Basin place TRPA's program well within the limits of regulatory authority established by this Court. As detailed below, the TRPA program grew out of the urgent need to protect the deteriorating quality of the once-pristine waters of Lake Tahoe.

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[3] In any event, water pollution, which has been directly linked to development in the Tahoe Basin, constitutes a nuisance under common law principles. See Carter v. Chotiner, 291 P. 577, 578 (1930); Newhall Land and Farming Co. v. Superior Court, 23 Cal. Rptr. 377, 381 (Ct. App. 1993); see also Goldblatt, 396 U.S. at 596 (upholding restrictions on mining below the water table).

Developed in response to a court order enforcing the mandate of the congressionally-approved Tahoe Regional Compact, the 1987 TRPA regional plan is the result both of documented scientific evidence and of a lengthy consensus process, which included all of the constituencies affected. As such, the TRPA program, which adjusts "'the benefits and burdens of economic life'. . . in a manner that secures an 'average reprocity of advantage' to everyone concerned . . . ." is constitutionally valid. Lucas, 505 U.S. at 1018.

C. The Tahoe Program Was Developed Over Many Years In Response to Extensive Scientific Evidence Demonstrating That Development in The Lake Tahoe Basin Is A Primary Cause of the Decline of Water Quality in Lake Tahoe.

1. The Water Quality of Lake Tahoe is Threatened by the Impacts of Development.

The Lake Tahoe Basin is an area of undisputed natural beauty. The single attribute that makes Lake Tahoe unique as a national resource is "its remarkable clarity and enormous volume of deep, cobalt-blue waters." Charles R. Goldman and Earl R. Byron, California State Water Resources Control Board, Changing Water Quality At Lake Tahoe: The First Five Years of the Lake Tahoe Interagency Monitoring Program 2 (Tahoe Research Group, Institute of Ecology, University of California Davis, CA) (covering 1979-84) [hereinafter Changing Water Quality]. In 1962, it was possible to see through the waters of the Lake to a depth of 136 feet. People ex rel. Younger, 487 P.2d at 1195 n.5 (citing S.Rep. 91-510 supra). Visibility in the Lake today is only 75-80 feet. Goldman, supra, at 1490. The clarity of the Lake nonetheless remains its outstanding feature.

Lake Tahoe's famous clarity stems from the Lake's very low levels of nutrients such as nitrogen and phosphorus. The natural nutrient level in Lake Tahoe is so low that historically it prevented the growth of algae, which decreases the clarity and

quality of water. Changing Water Quality, supra, at 2, 4-6; see also Goldman at 1489. Over the last three decades, however, levels of these substances in the Lake have increased significantly. Changing Water Quality, supra, at 2, 4-6. These nutrients have stimulated algae growth in the Lake, id., with the result that since 1968, the clarity of Lake Tahoe has decreased by approximately 20%. Richard J. Fink, Public Land Acquisition for Environmental Protection: Structuring a Program for the Lake Tahoe Basin, 18 Ecology L.Q. 485, 504. Algal growth in the Lake has been increasing at a rate of 5.6% a year and the Lake continues to lose its clarity at a rate of .37 meters per year. Goldman, supra, at 1489. Lake Tahoe, "without a drastic reduction in the nutrient loading that supports algal growth, will have lost most of its transparency in only forty more years." Charles R. Goldman, The Eutrophication of Lake Tahoe: A Serious Increase in Algal Growth Accompanied by an Alarming Decline in Transparency 3. (Report to the Senate Select Committee on Tahoe, March 6, 1984).

The primary source of increased nutrients in Lake Tahoe is the increased runoff caused by development in the Tahoe Basin, an area of 501 square miles. Changing Water Quality, supra, at 5, 8; Goals and Policies, supra, at iv. Development disturbs soils, increases impervious surface coverage of natural areas (thereby increasing the rate at which water will flow into streams and ultimately the Lake), causes air pollution and therefore deposition of pollutants to the Lake from the air, and increases the use of fertilizers and other potential sources of nutrient and water pollution, which also drain into the Lake. Changing Water Quality, supra, at 5; John Ayer, Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup, 1 Ecology L.Q. 3, 38 (1971). A 1984 study of the causes of increased nutrients in the Lake found that "the nutrient yield from the various Tahoe watersheds [draining into the Lake] is generally related to the extent of disturbance of soils in those watersheds." Changing Water Quality, supra, at 8.; see also Ayer, supra, at 38 ("human activities that provoke sedimentation are probably the chief threat to the water quality of Lake Tahoe").

Development in stream environment zones is particularly destructive because streams in the Basin drain directly into the Lake; as a result, development on properties immediately adjacent to water courses results in the unimpeded transport of sediment and associated pollutants to the Lake. See Tahoe-Sierra Preservation Council v. State Water Resources Control Board, 259 Cal.Rptr. 132, 136-37 (Ct. App. 1989) (discussing impact of development in stream environment zones on water quality). Petitioner's property is no exception; in early January 1997 the lower one-third of petitioner's property was covered with water as the soil was saturated and Mill Creek overflowed from storms in the Basin. This water flows directly into Lake Tahoe, taking all manner of pollutants with it.

Although petitioner and amici attempt to downplay pollution of the Lake as a trivial aesthetic issue (see, e.g., Brief Amicus Curiae of the Tahoe-Sierra Preservation Council, Inc. in support of petitioner at 7 [hereinafter TSPC Brief]),[4] increased algae production caused by nutrient loading not only clouds the Lake water, it causes eutrophication and has other long-term environmental impacts. Changing Water Quality, supra, at 6. Eutrophication is a serious water pollution problem that decreases available oxygen supply "to the point where aquatic organisms can no longer survive in the deeper waters." Id.[5] In addition,

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[4] Belittling the importance of Lake clarity, an amicus also implies that the TRPA restrictions are designed only to ensure that a "9-inch white disk lowered from a boat near the center of the Lake" can be seen at a certain depth by the human eye. See TSPC Brief, supra, at 7 n.1. Lake clarity is measured by use of a "Secchi disk"--a 9 inch white disk that is lowered into the water until it disappears. Changing Water Quality, supra, at 7. "This transparency measure is traditional in limnology [the study of inland waters] and oceanography and has stood the test of time because of its surprising accuracy." Id.

[5] The Federal Water Pollution Control Act recognizes eutrophication as a source of water pollution through its regulation of pollutants that deplete the amount of oxygen

"[t]he nuisance of algae-enveloped rocks becomes particularly obvious each spring when the dense growth of attached algae [caused by increased nutrient levels] breaks off, floats to the surface, and dies, forming decaying algal mats." Id; see also Ayer, supra, at 9 (siltation from "extensive land disturbance . . . changes the lake's pristine blue to a chocolate brown"). "Three decades of research reveals that Lake Tahoe is undergoing eutrophication at a rate far above that which would occur naturally." Fink, supra, at 503.

Thus, Lake clarity is an important indicator of the water quality and health of the Lake--quality which has been significantly impaired by development in the Basin.

2. The Land Use Regulatory Program at Tahoe is Carefully Designed to Address the Water Quality Impacts of Development in the Basin.

a. Early Attempts by TRPA to Protect the Lake Were Unsuccessful.

Because of its large size, the 190 square mile Lake was at first able to absorb the considerable impacts of population growth, development, and associated pollution. However, in the 1960s it became clear that the water quality of the Lake was threatened. Ayer, supra, at 28-30. In response to growing evidence that development in the Basin was contributing significantly to water quality degradation, in 1966, the states of California and Nevada imposed a ban on disposal of wastewater within the Tahoe Basin. Fink, supra, at 504. Under this agreement all sewage is transported out of the Tahoe Basin. Id. Then, in 1969, through ratification of the Tahoe Regional Compact (the "1969 Compact"), Congress approved establishment of TRPA--the first regional entity authorized to regulate the

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available to animal life in a water body. 33 U.S.C. § 1314(a)(4).

impacts of development on Lake Tahoe. Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969).

TRPA, pursuant to the 1969 Compact, undertook its first regulatory efforts with the adoption of a regional land use plan in 1971 and a land use development ordinance in 1972. Tahoe Regional Planning Agency, Land Use Ordinance (adopted Feb. 10, 1972) [hereinafter 1972 Ordinance]; Fink, supra, at 505. The land use plan, which formed the basis of the 1972 Ordinance, was developed with the assistance of the United States Forest Service and incorporated what is now referred to as the Bailey system--a land capability rating system designed to restrict development of environmentally sensitive lands while allowing development of appropriate areas. Fink, supra, at 505. The Bailey system categorized land in the Basin according to its suitability for development based on the land's sensitivity to soil erosion, its degree of slope, and the proximity to streams or high water tables. Id. Based on these factors, lands were ranked on a scale of 1 to 7 and were assigned a limit on impervious surface coverage such as buildings or pavement. Robert G. Bailey, U.S. Forest Service, Land Capability Classification of the Lake Tahoe Basin, California-Nevada: A Guide for Planning 18-22 (1974). Under the Bailey system, 76% of the land in the Basin was eligible for only 1% coverage. Fink, supra, at 505. Of particular importance to the present case, land within what is now referred to as a stream environment zone was eligible for only 1% coverage under Bailey. Bailey, supra, at 19, 22; 1972 Ordinance § 6.2.0.[6]

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[6] Petitioner asserts, without record support, that her land capability classification under the Bailey system was level 6. Petitioner's Brief, supra, at 2 n.1. However, as discussed below, the Bailey system did not classify individual parcels, but identified large geographic areas that fell into different land classifications based on soil type, erosion hazard, and proximity to streams and wetlands. Bailey, supra, at 5; Resources, Community, and Economic Development Division, U.S. General Accounting Office, GAO/RCED-95-22, Forest Service Land Acquisitions Within the Lake Tahoe Basin 5 (Oct. 1994); see also

Although the land use ratings under the Bailey system would have severely restricted development, under the 1969 Compact, TRPA was not effective in regulating development--no matter what its environmental impacts.[7] In 1980, in response to increasing conflict over development and its adverse consequences, Nevada and California agreed to amend the Regional Compact. Fink, supra, at 506. Congress ratified the 1980 Compact. Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233 (1980). Under the 1980 Compact, TRPA was required to establish "environmental threshold carrying capacities" for the resources in the Basin and was prohibited from approving development that would prevent the achievement of these thresholds. Id. at 507;[8] California v. TRPA, 766 F.2d at 1315-16. TRPA adopted the required thresholds in 1982, and in 1984, TRPA adopted a new regional plan.

Because it did not include sufficient implementation measures to ensure attainment of the adopted environmental thresholds, the 1984 regional plan was immediately challenged by the State of California and the League to Save Lake Tahoe. California v. TRPA, 766 F.2d 1308. Finding that the congressionally-approved 1980 Compact required TRPA to demonstrate that new development did not impede the attainment of the environmental thresholds, the district court issued an injunction that effectively prohibited any new development approvals in the Basin pending adoption of a valid plan. The ninth circuit affirmed. Id.

The ninth circuit's decision in California v. TRPA emphasizes the role of TRPA and its land use planning process in controlling the adverse environmental impacts of development

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Section I.E., infra.

[7] For a discussion of the limits of the 1969 Compact, see Fink, supra, at 506-07.

[8] The League to Save Lake Tahoe was actively involved in the formulation of the 1980 Compact.

in the Tahoe Basin. Specifically, the ninth circuit held that the 1980 Compact requires TRPA not only to adopt environmental threshold carrying capacities for the Tahoe Basin, but also to ensure that these thresholds are met. Id. at 1313, 1315-16 (quoting 1980 Compact art. v(g)).

b. TRPA's 1987 Regional Plan Represents the Consensus of Most Constituencies in the Tahoe Basin.

With the 1984 issuance of the district court injunction, conflict over development versus environmental protection in the Tahoe Basin reached its peak. In an effort to break an impasse that had characterized the Tahoe land use planning process since the 1969 Compact, TRPA convened a consensus process to develop a new regional plan. This consensus workgroup was composed of all the key constituencies affected by TRPA planning decisions, including representatives of federal, state, and local governments, the League, the Tahoe-Sierra Preservation Council, the North and South Shore Chambers of Commerce, the League of Women Voters, and the Tahoe Sierra Board of Realtors. See preface to Goals and Policies, supra. The consensus workgroup met for a year and, for the most part, was able to agree on the policies and goals that should guide development in the Basin; the recommendations of the consensus workgroup were adopted by the TRPA Governing Board in 1986 and implemented in TRPA's 1987 regional plan and Code of Ordinances. Fink, supra, at 508.

The agreements of the consensus workgroup established the basic framework for the land use program that now regulates petitioner's property. This 1987 regional plan does not represent a dramatic departure from earlier programs to regulate land use in the region, but builds on these prior efforts. For example, the consensus workgroup developed a new land capability rating system for residential parcels to replace the Bailey system. This new program, the Individual Parcel Evaluation System (or "IPES"), required a lot by lot analysis of the suitability of parcels for residential development throughout the Basin. Each lot was

then assigned a point score based on its development suitability. Building on the land use classification techniques developed under the Bailey system, IPES determined suitability for development based on the parcel's erosion hazard, runoff potential, accessibility, water influence areas, condition of the watershed, ability to revegetate, and need for water quality improvements in the vicinity of the parcel. Goals and Policies, supra, at VII-4. Each lot was given an IPES score after a site visit by a team of experts consisting of a soil scientist, a watershed expert, and a planner. Fink, supra, at 510.

Under the 1987 regional plan, 2,000 lots were permitted to be developed for residential use during the first six years of the Plan. Id. at 509. Lots required a minimum IPES score of 725 to be eligible for development. Kelly v. Tahoe Regional Planning Agency, No. 22913, Slip. Op. at 8 (Nev. Sup. Ct., July 8, 1993), Appellate R. 66A. This minimum IPES score was established based on the recommendation of a technical advisory committee and was designed to ensure that the minimum score was immediately above the ranking of the most sensitive parcels. Goals and Policies, supra, at VII-6. However, as agreed during the consensus process, local county jurisdictions could lower this minimum eligibility number provided that, among other things, the jurisdiction could show that it had implemented a water quality monitoring program and made "demonstrable progress" towards installing water quality improvements in that jurisdiction. Id. Thus, under the 1987 regional plan and IPES, parcels originally classified as undevelopable because they had scores below the minimum IPES cut off point could become eligible for development.

The other key area of agreement reached through the consensus process included support for the transfer of development rights program now challenged by petitioner. Goals and Policies, supra, at VII-14 to VII-17; Code of Ordinances, supra, ch. 20, J.A. at 45-57.

Thus, contrary to petitioner's arguments, TRPA's decision to prohibit development in stream environment zones is not arbitrary (Petitioner's Brief, supra, at 23), but is one element

of a "complex and extremely comprehensive," Fink, supra, at 509, regulatory system grounded in scientific fact and political consensus. The exercise of TRPA's regulatory authority to prevent water pollution and to protect a sensitive natural resource falls within the realm of important governmental interests that justify even stringent land use regulations. TRPA's plan balances the need to protect fragile resources with the desire to preserve private property rights. Under this program petitioner's attempt to establish a taking fails.

D. Petitioner's Property Retains Substantial Value And Under The TRPA Program, Petitioner Has Valuable Property Rights.

Petitioner purchased her property on September 7, 1972 for $4,500. Stephen R. Johnson & Associates, Inc., Tahoe Basin Act Land Acquisition Program Appraisal Summary and Certification, Assessor's Parcel No. 130-211-31, at 6 (Oct. 9, 1989) [hereinafter Suitum Appraisal].[9] On March 16, 1990, the State of Nevada offered petitioner $35,000 for her property as part of its land acquisition program established after the 1987 regional plan was adopted.[10] Supplemental Johnson Aff. ¶ 12, J.A. at 141. As mandated by

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[9] This appraisal was conducted by the State of Nevada in 1989 in response to petitioner's expression of interest in selling her property to the State.

[10] Amici criticize TRPA for failing to use state acquisition programs "to purchase the remaining undeveloped lots in the Mill Creek drainage . . . ." See, e.g., TSPC Brief, supra, at 16. TRPA does not control the state land acquisition programs, and in any event, as the record shows, Nevada did make an independent offer to purchase petitioner's property under its acquisition program. J.A. at 141. Indeed, Appendix C to the amicus brief submitted by Tahoe-Sierra Preservation Council indicates that numerous parcels in petitioner's subdivision were purchased by Nevada or the United States, while petitioner chose to retain her parcel.

Nevada law, this offer represents the fair market value of petitioner's property on July 1, 1980, prior to the adoption of the 1980 Compact. 1985 Nev. Stat. 585, § 7, amended by 1987 Nev. Stat. 444 § 3.[11] The appraisal assumed petitioner could build a home on her property. Suitum Appraisal at 4. The offer was not accepted.

As fully discussed in the parties' briefs, petitioner possesses several property rights under the TDR program. These include the rights to:

1. Compete for and transfer a residential development allocation.

2. Transfer up to four residential development rights, including up to three bonus rights.

3. Transfer the land coverage rights that would otherwise be allowed on her property to owners of developable lots.

These rights have a value that has been estimated to range between $40,000 and $51,500. Suitum v. Tahoe Regional Planning Agency, 80 F.3d 359, 363 (9th Cir.), cert. granted 117

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[11] Amicus Curiae Institute for Justice asserts that the Nevada offer is an attempt to buy petitioner's property for less than its fair market value. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 14-15. However, petitioner was offered $35,000 for a lot that she purchased for $4,500. The 1980 valuation date used by the State of Nevada generally represents the peak value of property in the Basin prior to implementation of the 1987 regional plan, and ensures that lots are purchased based on their pre-regulation value. Fink, supra, at 522 n. 258, (citing Dept. of Conservation and Natural Resources, Nev. Div. of State Lands, Final Report and Recommendations of the Commission on Land Acquisition in the Tahoe Basin 69 (1987)).

S.Ct. 293 (1996).[12] The extent of the permissible use of petitioner's property has not yet been determined because she has not attempted to obtain or transfer any of these entitlements; however, it is clear that the development rights give petitioner substantial value in her property.

Although petitioner characterizes the TDR program as a "ruse," (Petitioner's Brief, supra, at 30), at least one amicus appearing in support of petitioner has recognized the value of TDRs. At public legislative hearings in Nevada, a representative of the Tahoe-Sierra Preservation Council complained that "the cost of a residential development right is close to $30,000" and therefore too expensive. Minutes of the Meeting of the Legislative Commission's Committee to Continue the Review of the Tahoe Regional Planning Compact at 14 (June 6 & 7, 1994) (testimony of Mary Gilanfarr, Executive Director, Tahoe-Sierra Preservation Council). As a result, the Council urged the State of Nevada to sell the development rights associated with parcels the state had purchased under its land acquisition program, in order to lower the prices of development rights currently sold on the open real estate market. Id.

Evidence in the record supports the observations of Ms. Gilanfarr that TDRs have been sold for considerable value. Supplemental Johnson Aff. ¶ 13, J.A. at 141-43. In 1993, at the time petitioner's action was before the district court, several residential allocations had been sold in the Incline Village area of Washoe County (where petitioner's property is located) at prices ranging from $17,000 to $25,000 each. Id. ¶ 13(b), J.A. at 142.[13] Also in 1993, 56 residential allocations plus

[12] The manner in which the TRPA program creates a market for these developments rights is discussed below in Section II.

[13] Although none of the 1993 transfers were from unbuildable properties that received allocations through the TRPA 1993 drawing (Petitioner's Brief, supra, at 5 n.5), the evidence produced by TRPA demonstrates that there is a market for TDRs.

development rights were in escrow in Incline Village for $32,000 each. Id. ¶ 13(c), J.A. at 142.

Moreover, TDRs continue to sell in the Tahoe Basin and in Washoe County in particular. According to the TRPA permit database,[14] 27 residential allocations were transferred in the Basin between 1994 and 1996. Of these, five were in Washoe County. TRPA's public records show that 45 development rights, 17 of which were located in Washoe County, were transferred during that same period. Further, between 1994 and 1996 a lot owner seeking a transferable residential allocation for a property below the IPES line stood a very good chance of receiving it. In 1995, for example, six residential allocation rights were available to undevelopable properties in Washoe County, and only five lot owners sought them. Once again, in 1996, all of the parties that sought residential allocation were awarded one; four of these allocations were transferred to other properties. Thus, it is factually incorrect to argue, as petitioner does, that the TDR program is a "ruse" or that her application to transfer development rights under this program would have been meaningless.

E. The TRPA Program Has Not Interfered With Petitioner's Reasonable Investment Expectations.

As stated above, petitioner's takings claim is defeated by the substantial value her property retains. Moreover, her claim must be evaluated in light of her reasonable expectations. Penn

Furthermore, and contrary to petitioner's claim (id.), the record shows that residential development rights from parcels located in stream environment zones have been transferred to other lots. Scholley Aff. ¶ 15, J.A. at 148.

[14] TRPA retains a daily log of all permit applications. Scholley Aff. ¶ 13, J.A. at 147. This database is a public record. 1980 Compact, art. III(i).

Central, 438 U.S. at 130-31. Again, this inquiry fails to support petitioner's takings theory.

At the time petitioner purchased her property, TRPA had already begun to implement its first regional plan and land use development ordinance for the Basin. This program incorporated the Bailey system, and imposed a temporary moratorium on development on the 82 percent of lands in the Basin which were classified under Bailey as sensitive class 1, 2, 3 lands or stream environment zones. Fink, supra, at 506 n.139. The 1971 plan and 1972 ordinance followed years of study of water quality problems in the Basin and regulatory action to mitigate these problems, such as the prohibition on sewage disposal in the Basin and the adoption of the first Tahoe Regional Compact in 1969. The prohibitions now applicable to petitioner's property are not inconsistent with those set forth in the land use plans that were in effect at the time petitioner purchased her property.

Petitioner asserts, without any factual support in the record, that her land was designated as land capability classification 6 under the Bailey system. Petitioner's Brief, supra, at 2 n.1. Although in 1971 TRPA published a map of land capabilities classifying broad geographic areas according to the Bailey system, this map was not determinative of an individual parcel's suitability for development under the Bailey system. As specifically stated on the map,

> This study does not suggest that development should occur on the locations shown. It merely reveals which lands meet the criteria that have been selected. In addition, because of the scale of the map and the maps from which it was compiled, land capability levels within individual map units may not be uniform. For example, flat valley floors locally contain riparian zones along stream courses that meet the criteria for class 1b [stream environment zone], although shown on the map as class 7. It is therefore necessary that the final land capability classification for individual parcels should be based on detailed site evaluation and more detailed application of the land capability criteria.

Lake Tahoe Basin Land Capabilities, Planning Guide Map, 1971, prepared by U.S. Forest Service and TRPA. Thus, as specifically announced by TRPA, the Land Capability Map did not indicate all areas, such as stream environment zones, that were subject to the coverage restrictions established under the Bailey system.

The Supreme Court of Nevada in an unpublished 1993 opinion reviewed and rejected a claim that the development restrictions of the 1987 regional plan effected a taking. Kelly, Slip.Op., Appellate R. 66A. Nevada Court based its holding in part on its conclusion regarding the reasonable expectations of a 1966 purchaser of land in the Basin. It determined that early studies about the environmental problems associated with rapid growth at Lake Tahoe were sufficient to provide a property owner who purchased land in the Basin in 1966 with "adequate notice that his development plans might be frustrated." Id. at 15. The Kelly court also held the plaintiff's property retained substantial value even though the 1987 Plan prohibited development on multiple parcels owned by plaintiff. Id.

In sum, and contrary to petitioner's characterization, the TDR system is an integral part of a regulatory program developed over many years in response to serious environmental problems that have threatened the very attribute that makes Lake Tahoe such a valuable natural and economic resource. This system was not suddenly dropped on property owners in 1987 and certainly it was not developed as a way to circumvent Lucas. TRPA's regulatory program strikes a balance between advancing the important governmental interests at stake in preserving the quality of the Lake, and accommodating the rights of property owners. As such, the 1987 regional plan, including the TDR program, represents a constitutionally valid regulatory system.

II. THE TAHOE PROGRAM ACHIEVES AN UNPARALLELED RECIPROCITY OF ADVANTAGE AMONG PROPERTY OWNERS IN THE BASIN.

The 1987 regional plan assures an economic "reciprocity of advantage" to all parties. This Court has determined that such "reciprocity of advantage" is a significant consideration justifying a regulatory system. Pennsylvania Coal, 260 U.S. at 415; see Lucas, 505 U.S. at 1018. The current Tahoe program, forged out of years of political conflict and then consensus in the Basin, is explicitly designed to balance "the benefits and burdens," Penn Central, 438 U.S. at 124, of residents in the Basin in order to protect the resource upon which the entire community depends -- and which is of considerable importance to the entire nation.[15]

Certainly, the 1987 regional plan includes many stringent provisions governing land use in the Basin; petitioner, however, is not the only person who must bear the burden of these regulations. Every person, every business, and all the local governments in the Basin live with TRPA's strict environmental regulations, and they do so because protection of Lake Tahoe is critical to the value of their land and the viability of the regional economy. In addition to the development restrictions at issue here, key elements of the 1987 Plan include a general prohibition on new subdivisions of land in the Basin, Goals and Policies, supra, at II-9; a limitation on new commercial development to a total of 400,000 square feet during the first 10 years of the Plan, id. at VII-12; a limit of 300 new residential units to be permitted each year, (Barnett Aff. ¶ 10, J.A. at 98); strict limits on the amount of impervious surface coverage for new development, Goals and Policies, supra, at II-13; the requirement that capital improvement projects by local governments (such as road building) include best management practices to control runoff, id. at VII-21; and a requirement that new and existing developments pay mitigation fees for erosion and runoff control projects, id. at VII-17. The TRPA program also requires owners of existing development that exceeds the new coverage standards to reduce coverage on environmentally sensitive properties as a condition of modifying their existing improvements. Fink, supra, at 511.

The land use system at Lake Tahoe also includes several features designed to mitigate the economic impacts of TRPA's regulatory program on those property owners who would be most adversely impacted by certain provisions, such as the prohibition on construction in stream environment zones. For example, Nevada and California and the United States Forest Service all have land acquisition programs. Id. at 513. In the past 15 years, these ongoing programs have spent over $200 million to acquire environmentally sensitive parcels throughout the Tahoe Basin. Chris Bowman and Patrick Hoge, Runoff, Air Pollution Cloud Waters of Crystal-Clear Lake, Sacramento Bee, Dec. 8, 1996, at A8.

The TDR element of the 1987 regional plan, as endorsed by members of the consensus workgroup, is also designed to distribute the burden of the TRPA regulatory program. This TDR program balances the benefits and burdens of the Tahoe regulatory system, because many of the restrictions that affect all property owners create incentives for the purchase of transferable rights. For example, the limit on the number of residential allocations issued each year creates a market for the sale of allocations. Property owners who cannot build on their land may still compete for and sell residential allocations, which command a substantial sum in the market. Supplemental Johnson Aff. ¶ 13, J.A. at 141-43; see also Section I.D., supra. Similarly,

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[15] The governmental interest in preservation of the environmental balance at Lake Tahoe is heightened by the fact that more than 70% of the land in the Basin is publicly owned. Tahoe Regional Planning Agency, Water Quality Management Plan for the Tahoe Region 8 (adopted Nov. 30, 1988); see Kleppe v. New Mexico, 426 U.S. 529 (1976) (federal government has broad power to regulate private property affecting public lands). In complying with its responsibility under the Congressionally-adopted 1980 Compact to achieve specified environmental thresholds, TRPA is carrying out the federally sanctioned effort to regulate land use for the protection of important publicly owned property and resources.

TRPA generally grants only one residential development right per legal lot; however, owners of property designated for multi-family residential development may build an additional unit for each development right that they buy from another property owner. Scholley Aff. ¶ 14, J.A. at 147. Owners of land in stream environment zones are eligible for up to 3 bonus development rights, which they are permitted to sell under the TDR program. Id. ¶ 15, J.A. at 148. Finally, owners of buildable property who wish to add more than the land coverage permitted under IPES, may do so by buying coverage rights from other property owners. Barnett Aff. ¶ 5, J.A. at 96. Under this regulatory system, property owners with buildable lots are motivated to buy necessary allocations, development rights, and coverage rights, creating a market that benefits property owners, like petitioner, with unbuildable stream zone land.

Moreover, property owners are not the only parties who have participated in mitigating the impacts of development on the Lake. In addition to the $200 million spent so far on land acquisition, government agencies have invested more than $100 million in projects designed to reduce erosion from roads in the Basin. Bowman & Hoge, supra, at A8. Recently, voters in California and Nevada authorized bond measures that will make another $30 million available for water quality improvements in the Tahoe Basin. See TSPC Brief, supra, at 16 n.6. This considerable (and continuing) expenditure of public money has gone to remedy a problem caused largely by private development. Fink, supra, at 538-39.

Finally, as set forth in the goals and policies of the 1987 TRPA Regional Plan, which reflects the agreements reached during the consensus process, "[m]aintenance of the social and economic health of the region depends on maintaining the significant scenic, recreational, education, scientific, natural and public health values provided by the Lake Tahoe Basin." Goals and Policies, supra, at I-1. As recognized by the Nevada Supreme Court when addressing a property owner's challenge to TRPA's development restrictions on his land, "'every single one of Mr. Kelly's lots will eventually diminish in value if Lake Tahoe is despoiled. IPES is a burden, surely, but it also conveys

significant personal benefits to each landowner it serves.'" Kelly, slip op. at 15, Appellate R. 66A.

The best evidence of the beneficial impact of the TRPA program on property values, even those that cannot be built upon, is that found in the record below. The evidence produced below indicates that, under the 1987 regional plan, the value of petitioner's transferable development rights (including the right to sell an allocation) was between $40,000 and $51,500--for an investment of $4,500. Suitum, 80 F.3d at 363; see also Suitum Appraisal, supra, at 6. Although petitioner's property might be more valuable if she were permitted to build upon it and the rest of the existing regulatory system remained in place, it is not at all clear that her property would be more valuable without the system altogether.

If it were not for the considerable regulatory efforts made to reduce the impacts of development on the Lake, the very characteristics that make Lake Tahoe such a desirable and valuable place to live and own property would be destroyed. Recognition of this fact led to the compromises that now form the basis of TRPA's regulatory program. This program has become an accepted fact of life for most property owners and environmentalists in Lake Tahoe, who have after years of debate struck a balance between "'upgrading the community and environmental benefits.'" Chris Bowman & Patrick Hoge, Sides Agree on Plan for Mountain Mecca, Sacramento Bee, Dec. 8, 1996, at A1. Clearly, the effort to protect the environmental resources of Lake Tahoe has involved commitments and sacrifices by everyone in the Basin; it is not a burden shouldered disproportionately by individual property owners, and it is not a burden shouldered disproportionately by petitioner.

CONCLUSION

For the reasons set forth above, amicus curiae the League to Save Lake Tahoe respectfully requests that this Court affirm the ruling of the Ninth Circuit Court of Appeals.

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Respectfully submitted,

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